action for conversion. The authorities seem to hold that a nonfeasance, though it may amount to gross negligence, will not support the action for conversion. *Hawkins* v. *Hoffman*, 6 Hill 586; *Bromley* v. *Coxwell*, 2 B. & P. 438; *Biggs* v. *N. Y. etc. Ry. Co.*, 28 Barb. 515; *Bailey* v. *Moulthrop*, 55 Vt. 13; *Bolling* v. *Kirby & Bro.*, 90 Ala. 215; *Nutt* v. *Wheeler*, 30 Vt. 437.

This *Truitt* case stretches the doctrine of conversion a little too far when it places the burden of disproving conversion upon the carrier, and holds that in case of unexplained loss or substitution, a case of gross negligence is made out which will support the action for conversion; and that the shipper may thereby ignore the valuation he has contracted for, and recover the full amount of his loss.

There is no intimation in any of the leading cases which have construed the CARMACK AMENDMENT that the amount to be recovered in case of loss, depends upon the manner in which the loss has occurred. There is nothing to indicate that if the goods are lost through the slight or ordinary negligence of the carrier, the shipper can only recover the contract value; but that if the jury should find that the negligence was of such a character as to be called "gross," the shipper would be entitled to disregard his contract and recover what the goods are worth. These cases have firmly laid down the principle that no matter how the loss occurs, whether through negligence, —slight, ordinary or gross,—or otherwise, there shall be but one recovery, and that based on the contract valuation. *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Kansas Cy. R. R. Co.* v. *Carl*, 227 U. S. 639; *Mo. Kan. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Wells Fargo & Co.* v. *Nieman-Marcus Co.*, 227 U. S. 469; *Chi. R. I. & P.* v. *Cramer*, 232 U. S. 490; *Boston & Maine Ry.* v. *Hooker*, 233 U. S. 97; *Pierce Co.* v. *Wells Fargo*, 236 U. S. 278; *Atchison S. F. Ry.* v. *Robinson*, 233 U. S. 173.

The doctrine established in the *Truitt* case, if adopted, would overthrow the well established law governing limited-liability contracts; it would give the shipper the power to secure the advantage of low rates by making a low valuation, and, in case of loss, give him the right to recover the full value of the goods, if the jury should decide that the negligence of the carrier which caused the loss, falls within that vague and indefinite field called "gross" negligence. The carrier's liability would be determined by a hair-splitting process.

The rule laid down by the Georgia Court seems to be but another attempt on the part of the state courts to evade the consequences of the CARMACK AMENDMENT. It is doubtful if this doctrine would be sustained by the United States Supreme Court.

A. J. M.

LIABILITY OF COUNTY IN TORT FOR GOODS PURCHASED UNDER ILLEGAL CONTRACT.—In the recent case of *Hill County* v. *Shaw & Borden Co.*, 225 Fed. 475, the plaintiff, as a subcontractor for supplies furnished to the defendant County on an illegal contract, sued to recover for the same in an action against the County for conversion. It appears that the contract was entered into by a promisor, who was not a publisher of a newspaper having general

circulation within the County, as the statute required. (REV. CODES MONT., § 2897). This promisor subcontracted with the plaintiff, who furnished the supplies and the County has used the same. The court held that the contract was in derogation of the statute and void, but being a statute directory in nature, without a penalty attached for the violation thereof, a recovery could be allowed in conversion. This case is interesting because of the form of action and the view of the statute as applied in this case.

A diligent search has failed to discover any instance where a suit based on conversion was allowed or brought in a case of this sort. It is submitted that, in those cases where recovery is allowed upon an implied contract when the express contract is declared void, trover, detinue or replevin should be allowed as well as the quasi-contractual remedies which allow recovery quantum meruit. See 9 MICH. L. REV., 671 for a discussion of the quasi-contractual liability of municipal corporations.

There is a marked division in the cases where questions similar to the principal case are involved, namely, where the statute prescribes conditions and modes in which the municipality is authorized to contract, and there is a non-compliance with these statutory requirements. It is necessary to look at these lines of authority separately and in detail in order to find some common ground for comparison. In all of the following cases the authority of the municipality was not questioned otherwise than on the ground that the statute set limits in the mode or amount of the contract. One line of authorities takes the view that the controlling statute is mandatory, that the contract in violation thereof is void, and that no recovery can be had either on the express or on an implied contract. Common examples of this sort are: where the contract is ultra vires—*Moriarty* v. *City of New York*, 110 N. Y. Supp. 842; *Vito* v. *Simsburg*, 87 Conn. 261; *Grantz* v. *City of Kirkwood*, 182 Mo. App. 581, 166 S. W. 319; where the contract is in excess of the debt limit—*Gamewell Fire Alarm Tel. Co.* v. *Laporte*, 96 Fed. 664; *Draper* v. *Mayor of Fall River*, 185 Mass. 142; *Tukey* v. *City of Omaha*, 54 Neb. 370; where the contract is let without receiving sealed proposals—*Anderson* v. *Fuller*, 51 Fla. 380; *Daly* v. *San Francisco*, 72 Cal. 154; where the contract is prohibited unless the contract be executed in a particular way—*City of Paris* v. *Sturgeon*, 50 Tex. Civ. App. 519, 110 S. W. 459; *City and County of Denver* v. *Hindry*, 40 Colo. 42, 90 Pac. 1028; *Kelley* v. *Torrington*, 80 Conn. 378; *Roemheld* v. *City of Chicago*, 231 Ill. 467.

Another line of authorities takes the view that the statute is merely directory, that the contract is void, but that a recovery may be had on an implied contract. Under this view the city is bound (though not on the express contract) to pay for the benefit it has received from the performance of the contract. This view is well expressed in 1 DILLON, MUN. CORP. (3 Ed.) § 936, where it is said that mere irregularities in the contract will not free the city from all liability when persons have parted with money and property to the benefit of the city. To the same effect see: *Cathers* v. *Moores*, 78 Neb. 13, 113 N. W. 119; *Ward* v. *Forrest Grove*, 20 Ore. 355; *Nebraska Tel. Co.* v. *City of Red Cloud*, 94 Neb. 6, 142 N. W. 534. "If the city has no authority to contract at all then the rule of ultra vires applies with full force, but

when it has power and the exercise is irregular, the city is liable for the benefits." Other examples of liability in spite of such irregularity are: failure of the city comptroller to countersign the contract for water mains, *Griffin* v. *Tacoma,* 49 Wash. 531; failure to present a note, given for money loaned, to the chief burgess for his approval, *Long* v. *Lemoyne Borough,* 222 Pa. 311. Where a city had authority to contract for public improvement but no authority to give bonds in payment thereof, it was said in *Hitchcock* v. *Galveston,* 96 U. S. 341, "though payments cannot be made in bonds because their issue was ultra vires, it would be sanctioning rank injustice to hold that no payment need be made at all." See also *Marsh* v. *Fulton County,* 10 Wall. 676.

It is submitted that these views are not essentially at variance. Under either view of the statute, whether it be considered as directory or as mandatory, the contract made in violation of the statutory provisions is void and a recovery thereon is denied. The difference arises when recovery is sought on an implied contract. Courts which consider the statute as mandatory deny the right to recover on the implied contract where there has been disregard of provisions as to the debt-limit, as to the submission of sealed bids before letting the contract, or as to the manner or mode of contracting. As set forth in *McDonald* v. *Mayor,* 68 N. Y. 23, "The purpose of the statute was not to instruct the officers of the municipality, but is a restraint on all persons dealing with the officers as well. The statute is an express legislative inhibition upon a city that it may not incur liability unless in writing and by record." To allow a recovery on the implied contract would defeat the purposes of the statute in its efforts to place safeguards about the taxpayer. Under this view the authority to contract is denied in the particular case unless prescribed conditions are fulfilled. This, it is submitted, is the distinguishing mark in the cases cited. "Courts are in full harmony in holding that one who deals with a municipal corporation in matters beyond its corporate capacity, can have no remedy in law or equity," *First Nat. Bank* v. *Village of Goodhue,* 120 Minn. 362. Where the statutory requirements are so regarded that they are conditions precedent and a grant of the authority to act in the particular case, the result is unavoidable; viz:—that unless the controlling statute is carried out in all its requisites, no recovery can be had either on the express or on an implied contract.

Courts which consider the statute directory are equally logical. In this class of cases, the authority of the municipality to contract for the thing or the service performed is not in question as was said in *Vito* v. *Simsburg,* supra: "It is well settled that municipal corporations cannot be made liable on implied contracts which would be ultra vires if attempted in express terms or which they are forbidden by statute to enter into except in a particular manner." The statute when considered as directory does not confer the authority to act, but names requisite formalities which are to be observed in executing the contract. It is evident that the taxpayer has very little interest in the form or the mode of the contract, so the safeguard which was important under the mandatory statute in order to protect the taxpayer, is very little involved in this class of cases. The implied contract is not prejudicial to the taxpayer when the right of the municipality to contract

in the particular instance does not flow from a statute, which merely enacts a method for executing the contract. The proceeding before the court to determine the benefit which the municipality has received is a full protection to the taxpayer, and likewise enforces against the municipal corporation a just demand which it, in all equity and fairness, should be made to satisfy.

A peculiar view was taken in *First Nat. Bank* v. *City of Emmetsburg,* 157 Ia. 555, where a mandatory statute was held not to apply to those contracts made by the municipality in its proprietory capacity. It is submitted that this classification is erroneous. Such a division according to the function of the municipality involved in the contract, is without reason and must result in confusion. This view is condemned in *City of Astoria* v. *Amer. La France Fire Engine Co.,* 225 Fed. 21, where the court says: "Where the city charter prescribes the manner in which contracts shall be made, this mode is obligatory whether the city is acting in a governmental or a proprietory capacity." R. E. R.

THE DISTINCTION BETWEEN PREFERENCE AND SET-OFF IN BANKRUPTCY.—Two state courts have recently handed down apparently opposing opinions on a perplexing question of bankruptcy law. In *Knoll* v. *Commercial Trust Co. of Reading* (Pa. 1915), 94 Atl. 750, a depositor, within the four months preceding his bankruptcy, gave the defendant bank, which knew of the depositor's insolvent condition, a check drawn against his account in that bank to satisfy his overdue note held by the bank. The court allowed the trustee in bankruptcy to recover the amount of the check on the theory that the giving of the check amounted to a preference within the meaning of § 60 of the Bankruptcy Act; and the court refused to sustain defendant's contention that the case should be governed by § 68 of said act, which provides for the setting off of mutual debts "between the estate of a bankrupt and a creditor."

In *Chisholm* v. *First National Bank of Leroy* (Ill. 1915), 109 N. E. 657, the depositor had overdrawn his account and thereby became a debtor to the bank. Later he made more deposits, against which the bank allowed him to check for a few days, after which it refused to honor his checks. The amount then on deposit was less than the debt due on the overdraft; and the action of the bank in refusing to honor his checks was in effect an appropriation of the amount on deposit to the partial payment of the debt due on the overdraft. About two months later, the depositor was adjudicated bankrupt. His trustee sought to recover the amount of the deposit, but the court held that the bank's appropriation of the deposit was permissible under § 68, citing and relying on *Tomlinson* v. *Bank of Lexington,* 145 Fed. 824, 76 C. C. A. 400, (another case of setting off deposits against overdrafts) and other cases.

Each of these courts decides the question purely on the authority of what it understands to be the rule adopted by the Federal Courts. The Pennsylvania court recognizes the principle laid down in *New York County National Bank* v. *Massey,* 192 U. S. 138, 24 Sup. Ct. 199, that a deposit in a bank is in no sense a payment, since it creates the relation of creditor and